

Real Estate Law Update



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Coming Soon: New Environmental Liens and Covenants on Properties in Delaware

The Delaware Department of Natural Resources and Environmental Control (“DNREC”) has been actively drafting legislation that, if passed, will have significant impact on borrowers, lenders and others involved in real estate purchase and financing transactions.

DNREC is aggressively pursuing this legislation to remove any doubt or uncertainty that may have previously existed about whether or not it possesses the statutory authority to place an environmental lien on property upon which DNREC has expended public money to investigate or clean up. Up until now, DNREC has not attempted to impose an environmental lien on any property in Delaware. This will likely change, however, if the legislation is passed given the number of properties throughout the State that would qualify for the imposition of this new environmental lien.

DNREC’s legislation will authorize a lien for all costs associated with the investigation and cleanup of hazardous substances on a property, including petroleum from aboveground and underground storage tanks. Some of the more important aspects of this lien that you should be aware of are: (1) the lien would have priority over all other liens perfected later in time; (2) it would have no expiration date and will continue until it is fully satisfied; (3) it will not be limited or discharged in a bankruptcy proceeding; and (4) if DNREC believes that the existing equity in the property or the proceeds from any sale of the property will be insufficient to satisfy the lien, DNREC may impose an additional lien on other Delaware property owned by the same owner .

Other legislation being considered by DNREC involves expanding the list of events or conditions that may trigger the placement of an environmental covenant on property as a condition for its development or redevelopment. These recorded agreements have been in existence now since about 2005. However, they have generally been confined to those properties where there exists some level of residual hazardous substances after a DNREC-approved cleanup has been undertaken and completed under the DNREC program known as the Delaware State Superfund Program.

Under the new legislation, an environmental covenant could be triggered by residual contamination left over from the investigation or cleanup of a leaking underground or aboveground storage tank site not otherwise included in the Delaware State Superfund Program. Given that the number of known sites with leaking (and possible leaking) underground and aboveground storage tank throughout all three (3) Counties is quite high and dwarfs the number of sites addressed under the State Superfund Program, these environmental covenants and the obligations and limitations associated with them may become much more prevalent. This will certainly require greater awareness and scrutiny from those involved in the ownership, development, redevelopment and financing of such properties.

For further information on this topic or other environmental matter, please contact Stephanie L. Hansen, Esq. at (302) 571 -6733.